#2

See p. 55
58 prostitution
22
20
49
50
51 prostitution

P U B L I C   H E A R I N G

before

ASSEMBLY JUDICIARY COMMITTEE

on

PROPOSED PENAL CODE
(Assembly Resolution No. 13)

SOLICITATION

2C 33-4 general harassment statute

23 34-3 loitering + intent to solicit

Held:
June 20, 1972
Assembly Chamber
State House
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblyman William K. Dickey (Chairman)
Assemblywoman Ann Klein
Assemblyman Walter C. Keogh-Dwyer
Assemblyman Herbert C. Klein
Assemblyman David A. Wallace

* * *

ASSEMBLY RESOLUTION No. 13

STATE OF NEW JERSEY

INTRODUCED MARCH 13, 1972

By Assemblymen DICKEY and OWENS

(Without Reference)

AN ASSEMBLY RESOLUTION directing the Judiciary Committee of the General Assembly to review the proposed Penal Code prepared by the Criminal Law Revision Commission and to report thereon on or before October 1, 1972.

WHEREAS, The Criminal Law Revision Commission has submitted a comprehensive report and a proposed New Jersey Penal Code which the Legislature should consider for enactment at the earliest practicable time; and

WHEREAS, The proposed Penal Code has been widely distributed and is the subject of in depth study by law enforcement officers at State, county and municipal levels, the judiciary and members of the bar and their recommendations with respect to its provisions should be solicited and considered; and

WHEREAS, Enactment of the proposed Penal Code will necessitate revision, compilation or other appropriate legislative disposition of a number of statutory provisions not included in the draft of the code as prepared by the commission; now, therefore

BE IT RESOLVED *by the General Assembly of the State of New Jersey:*

1. The Judiciary Committee of the General Assembly is requested and directed to review the proposed Penal Code as submitted to the Governor and the Legislature by the Criminal Law Revision Commission, confer with the commission, the Supreme Court, the Attorney General, county prosecutors and other law enforcement officers and agencies, hold public hearings on the proposed Code and report to the General Assembly on or before October 1, 1972 with a proposed Penal Code in appropriate form for consideration and enactment into law.

2. The Judiciary Committee shall be entitled to avail itself of the assistance of such legislative, executive and judicial agencies as may reasonably be made available to it and shall invite the members of the Judiciary Committee of the Senate to sit with it in the public hearings it is hereby requested to conduct.

I N D E X

ASSEMBLYMAN WILLIAM K. DICKEY (Chairman): Ladies and gentlemen, this is a public hearing of the Assembly Judiciary Committee, pursuant to Assembly Resolution Number 13, authorizing this Committee to hold public hearings concerning the proposed Penal Code. The Penal Code was prepared by the Criminal Law Revision Commission which has submitted its report, dated October, 1971.

The members of the Committee present today are Mrs. Ann Klein of Morris County, Mr. David Wallace of Hudson County. My name is William Dickey. I am Chairman of the Committee and am from Camden County. There may be other members of our Committee attending. I will introduce them when they arrive.

I should like to call as our first witness the Chairman of the Criminal Law Revision Commission, Professor Robert E. Knowlton of Rutgers Law School. Professor Knowlton, will you step up to the desk which has my name on it.

Professor Knowlton, we are very pleased to have you with us today.

I see one additional member of our Committee is now present, Assemblyman Walter Keogh-Dwyer of Sussex County.

Professor Knowlton, thank you very much. You may proceed.

R O B E R T E. K N O W L T O N: Thank you, Chairman Dickey.

At the outset, as Chairman of the Commission, I would like to thank the Legislature through this Committee for establishing the Commission and for funding it so that we could do our work.

Secondly, I would like to thank the Legislative Reference Agency for its assistance in the drafting of the proposal that we have made.

I expect to speak very shortly and in general terms now, but I do want to impress upon the Committee, for

myself and I believe for all of the members of the Commission and of the Commission's staff, that we want to do everything possible that we can to assist you in your work. So I would hope that you will feel free to avail yourselves of our services whenever the opportunity or the need arises.

The statute which created the Commission imposed upon us the obligation of creating a modern Criminal Code for New Jersey. I think our proposal meets those standards. It is a Code which is an attempt to rationalize out the Criminal Law, in the light of Professor Wechler's statement, on a rational Penal Code. The Criminal Law has not grown consistently or rationally. We tried to give it a rational content.

We do other things, I think, that are important in a modern Criminal Code. For example, we tried to formulate in the statute for legislative determination the general principles of Criminal Law, those things that relate to the area of self-defense, justification, culpability, all of the things that we do not have today in New Jersey.

Secondly, we tried to rearrange the sentencing structure. The sentencing structure in New Jersey I think is archaic. It is haphazard. Each crime has its own individual punishment. There is very little rhyme or reason sometimes between the relationship of punishment for rather closely-related crimes.

We have tried to improve the sentencing situation in a number of basic ways. In the first place, we put all the crimes in categories. We have 4 categories of crimes. I believe, and I think it was the Commission's point of view, that the Legislature operating before the fact on general statements cannot make the fine distinctions that the present Code attempts to make.

We have improved sentencing in other ways. We have limited to some extent the discretion of the trial judge in an attempt to avoid what people claim are

the time. I would be interested in doing that and I would be happy to submit it in memoranda to this body, if you would wish.

ASSEMBLYMAN DICKEY: We would be pleased to receive that.

Mrs. Klein?

ASSEMBLYWOMAN KLEIN: You have the statistics on New York which has a very strict corroborative evidence law.

MISS ELWELL: Yes.

ASSEMBLYWOMAN KLEIN: Do you have statistics on any states that don't have that corroborative --

MISS ELWELL: No, I don't. And, once again, that's work that I would be happy to do; I did not have time to do it before coming here today.

ASSEMBLYWOMAN KLEIN: I was intrigued by Mr. Klein's question. How do you differentiate between violent and non-violent rape?

MISS ELWELL: Very good. I assumed when he asked the question that there were divisions such as are in this Penal Code between I think what you call aggravated assault and non-aggravated assault. However, I would suspect that there aren't such divisions and, therefore, all I would be able to give you would be statistics on rape in other states, or perhaps rape in connection with another crime of violence.

ASSEMBLYMAN KLEIN: I didn't know whether the question was asked of the witness or of me but apparently it was asked of me, and I think that the distinction - and maybe the terminology is an inappropriate one, but there are rapes that involve people who have some relationship with each other, they know each other, and then there are rapes where the victim is a complete stranger to the assailant, and generally the latter category is considered a violent one and the other one is perhaps inappropriately called non-violent but I think generally considered that way, and that's the distinction I was

talking about.

MISS ELWELL: That would be incidents between someone, at least at the beginning, who is a voluntary companion of the rapist.

ASSEMBLYWOMAN KLEIN: Yes.

MISS ELWELL: Those kinds of statistics would not exist. If you were free to read the transcripts of rape trials then you would have that information. We do not.

ASSEMBLYMAN DICKEY: Mr. Keogh-Dwyer, any questions?

ASSEMBLYMAN KEOGH-DWYER: No.

ASSEMBLYMAN DICKEY: Mr. Wallace?

ASSEMBLYMAN WALLACE: No questions.

ASSEMBLYMAN DICKEY: Thank you very much, Miss Elwell.

The next witness, Mr. Thomas Jenkins, Chairman, New Jersey Afro-American Law Enforcement Officers Association.

I don't see Mr. Jenkins.

The next witness is Dr. Arthur C. Warner, Co-Chairman of the National Committee for Sexual Civil Liberties, American Civil Liberties Union of New Jersey.

A R T H U R C, W A R N E R: I am here representing not only the National Committee for Sexual Civil Liberties of which I am National Co-Chairman --

ASSEMBLYMAN DICKEY: Would you state your full name and address, please?

DR. WARNER: Arthur C. Warner, 98 Olden Lane, Princeton, New Jersey.

As I was about to say, I'm representing not only this Committee of which I'm National Co-Chairman, a list of the members of which I would like to take the liberty of distributing to the Committee right now, if I may, (See p. 40 A) but I have also been asked by the American Civil Liberties Union of New Jersey to represent

them this afternoon with respect to the particular provision which I have come here to discuss, which is Section 2C:34-3, the solicitation provision in the proposed Penal Code.

Let me say at the outset that our Committee approves very much of the general tenor of the Code. As the name of our Committee indicates, we are particularly concerned with the area of sex and the removing from the Criminal Code - not only of this State but we are a National Committee, all of the states -- the removal of criminal sanctions against private acts between consenting adults.

We feel that the Commission has done a very good job with one exception and that is the sexual solicitation provision. And I would like to take a little time first, this afternoon, to discuss the rationale of these provisions that are found in a number of states but not in all of them, and also to give our position with respect to them.

The archetype of all these state solicitation statutes was an English Act of 1898 which prohibited persistent importunities amongst males. Most states required, until the Model Penal Code, an actual solicitation before the criminal law could be implemented. But Section 251.3 of the Model Penal Code actually introduced a new theory of solicitation, namely, it proscribed loitering plus intention to solicit. I should say that solicitation statutes in many jurisdictions are subsumed under a number of heads - they may be known as soliciting or loitering for the purpose of soliciting or making an indecent proposal.

And I should also say, at the outset, that what we are discussing are conversations, solicitations. We are not here to suggest that any kind of sexual act in public should be legalized. We're talking simply about conversations.

Now the rationale, of course, of all of these

statutes is presumably to prevent affront and offense to the public. And this is clearly stated, of course, in Section 2C:34-3 in which it is indicated that the law can be implemented only where there is offense or alarm to others.

Let's examine first what the crime consists of. We think of them as being public acts. In truth, they are no more public than if you and I in a stadium, at a Princeton game, for example, were to have a private conversation. They are private conversations, the locus of which is a public place; but it does not necessarily follow from this that because the locus is public that they are heard by anybody else except the individual they are addressed to. So, the first thing we have to ask ourselves is, are these fully public? The next thing is, to what extent do they offend or alarm? And this involves the entire character of these statutes because it is almost impossible to find a conviction in any jurisdiction that does not involve a plainclothesman or a plainclothesman who is connected with a vice squad; that is a complaint by private individuals claiming that they have been offended or alarmed are virtually unknown.

Now this is not only the experience of our own Committee which has looked into this matter for some time but it was the view of the group of six authorities who a few years ago made a very in-depth study of the homosexual solicitation laws. Because I should also have said at the outset that while these statutes are framed, as is this statute, to include heterosexual solicitations as well as homosexual ones, they are in fact are used administratively only against homosexuals, and they are the big catchall which brings homosexuals within the purview of the law, it's not the sodomy laws - as important as it is to repeal them insofar as they apply to sexual acts between adults in private.

Basically the burden of what I am going to say is that the sexual solicitation statutes are not only unjust but they do not protect the public from anything, and that their mere presence on the statute books serves as a device for victimizing the, mainly, homosexual.

Now I want to refer to this study which was most important because this sets the tone for our whole understanding of it. It appears in the U.C.L.A., University of California, Los Angeles, Law Review, and it's known as The Consenting Adult Homosexual and the Law. Every aspect of the laws against homosexual solicitation was examined by these six researchers. In a sense it can be called the Woolfenden Report on the solicitation statutes.

They found, for example, that so far as they were concerned they could find no evidence at all of any convictions in their jurisdiction of California outside of police-instituted arrests.

Now we are confronted here with a dichotomy because if this offense constitutes such a public outrage, we must ask ourselves why it is necessary to employ decoy methods in order to apprehend the victim, or rather the alleged culprit, because this is a universal method by which offenders under these statutes are apprehended.

In many jurisdictions vice squad officers devote themselves full-time and appear in mufti, that is in plainclothes, to deliberately entice - and I use the word "entice" because their conduct does not go all the way involving entrapment, it doesn't constitute legal entrapment but it's enticement, de facto enticement, and that is the only way in which anyone can be brought within the purview of the law.

The U.C.L.A. investigative service on interviewing police departments found that communications from private citizens concerning solicitation by homosexuals are extremely rare.

This brings us to the next question and that is the extent to which the class of persons that these statutes are supposed to protect are in fact protected.

Again, the U.C.L.A investigators pointed out that either citizens are not outraged by this type of behavior or that homosexuals are discreet as to whom they solicit.

I think our statutes of these kinds have to be based on empirical fact and not on hypothetical assumptions as to the nature of homosexual solicitations. There is a great deal of evidence, and the evidence is overwhelming - and I'm quoting now from a field survey that was made in England: "Most homosexuals who are cruising for partners do not brazenly solicit the first available male, nor are they going to employ glances, gestures, dress and engage him in conversation to elicit a promising response from the potential partner before an unequivocal solicitation for a lewd act is pandered."

Again, from another Researcher, Michael Scofield: "The great majority of homosexual solicitors are merely trying to find out if the other man is homosexual by the use of words or an inquiring look which would go unnoticed by the man who was heterosexual."

The question , I submit, that has to be asked is, To what extent do these statutes actually protect people from affront or alarm? Now on this score our Committee is pleased with the professed rationale behind this section. Then if we were confronted with a statute that was doing this, there would be no objection to it. But, by definition, this kind of a statute cannot do it.

And the next question that arises is, offenses and alarms caused by sexual solicitations are obviously a form of harassment - why does this form of harassment require a specific section in the statute of its own when we have right in the Code, in the form of - well, I

will give the section in a moment - but there is in the Code a general harassment statute - yes, 2C:33-4 subsection (c). Now we would submit, or rather we would ask why that provision does not suffice for all forms of alarm or offensive conduct whether sexual or non-sexual. Why is a special sexual provision necessary? Why insist on tarring offenders with a peculiarly sexual crime, with all the scarifying consequences of a conviction for a morals offense, when it is claimed that the gravamen of the offense is not its sexual character but its offensiveness?

Remember, this Code is going to be legalizing, in private, adultery, fornication and sodomy. It is to be expected therefore that people are going to communicate with each other in order to accomplish these acts in private.

It's illogical and inconsistent with this repeal on the one hand to prescribe ordinary communications between people in order to gain these professed ends which are now licit; in fact, we submit that Section 2C:34-3 is simply legal sophistry. All it does is provide in many jurisdictions a sufficient number of arrests for police officers who are short of their arrest quota. This is true in some jurisdictions.

And I am sure that I don't need to mention the fact that a statute of this kind is open to a great deal of blackmail and corruption.

Now, having said this, let me go into the actual background, as we see it, of 2C:34-3. If the Committee will look on page 122 it will see there as Source or Reference, Model Penal Code 251.3 and Proposed Federal Code 1853. And I should like to take the Committee's attention for a short while to discuss those two provisions which are used as justification for this provision.

251.3 is the Model Penal Code's solicitation provision. It's drafter was Professor Louis Schwartz

of the University of Pennsylvania Law School. 1853 was an equivalent provision originally in the Proposed Federal Criminal Code but which was then repudiated by the staff. And the final provision, as it emerged in the completed draft of the Federal Criminal Code was 1861 which is based on a completely different theory of jurisprudence. The reason for this is the following: 251.3 of the Model Penal Code was Professor Schwartz's thinking ten or fifteen years ago. Our own Committee, on a number of occasions over the past few years, had occasions to discuss the whole empirical situation so far as statutes like this are concerned, and Professor Schwartz changed his mind; so much so that he even made a commitment that if the Model Penal Code were ever published, which it never has been, that there would be a comment placed at where 251.3 is to the effect suggesting an alternative, namely, to have no such solicitation provision at all.

The result was that when the final draft of the Federal Criminal Code was submitted to the President and Congress, a year last January, it did not have 1853, it had 1861, which is a completely different provision. It is based basically on the harassment statute of New York State, which is Section 240.25. And that lumps together a number of different acts, some sexual and some non-sexual, which involves harassing others.

I will give you an example of what I am talking about by quoting from that statute. It proscribes: "Whether any person is guilty of an offense if with intent to harass, annoy or alarm another person, or in reckless disregard of the fact that another person is harassed, annoyed or alarmed by his behavior, he (1) engages in fighting or in violent, tumultuous or threatening behavior, makes unreasonable noise, in a public places uses abusive or obscene language, obstructs vehicle or pedestrian traffic, and, finally, while loitering in a public place for the purpose of soliciting sexual contact he solicits such contact."

Now there is a further provision, and this is very important: "Complaint by member of the public required. Prosecution under paragraph (F)" - also some other paragraphs here but what we're concerned about is paragraph (F) of this Federal provision which is - while loitering in a public place for the purpose of soliciting sexual contact, to solicit such contact. Prosecution under paragraph (F) of subsection 1 shall be instituted only upon complaint to a law enforcement officer by someone other than a law enforcement officer.

In short, if the law is to protect the class of people which it professes to protect, that it do so without being a source of either blackmail or official corruption.

Now the general view of our Committee is that a humane and decent Criminal Code in the area of private sexual conduct should have no solicitation provision. Why do we say this? The State of Illinois has now gone for 11 years, not only having repealed its adultery, fornication and sodomy laws as they apply to private sexual conduct between consenting adults but it has had no solicitation law for that period of time, and no one is suggesting that the standard of public morals in Illinois is any different or worse than anywhere else in the country.

Connecticut did the same thing three years ago, effective last October. And I would bring to the Committee's attention the fact that demographically and geographically Connecticut is very similar to New Jersey. It's adjacent to New York; the size of its cities are roughly the same; the ethnicity of its population is comparable.

The same is true of the State of Hawaii which did that this year. And, furthermore, the State of New Mexico has never had a solicitation provision.

I have mentioned before, and I think it's

worth pointing out, that many of these solicitation provisions are not called solicitation laws. They may be framed with both heterosexual and homosexual conduct in mind but, because of the vast changes that have occurred in the area of sexual morality, administratively these laws today are employed exclusively against homosexuals. And the intention of these laws is quite clear, despite the fact that they may be even-handed in their actual wording.

The temporary State Commission for Revision of the Criminal Laws in New York, which sat in 1964 and drafted the present New York Penal Code, originally had a provision very similar to this which was going to proscribe both heterosexual and homosexual provisions. At the public hearings it was brought to the attention of that Commission that the provisions as they then stood would have made criminal a young man who on a park bench asked a girl whether she wanted to go to bed with him. And the Commissioners said, and I was there at the hearings and heard them say this, "Oh, no, we didn't intend to do this." So what they did was simply limit the thing to homosexual solicitation. The point is, they didn't need to do so because de facto, administratively, the law wouldn't have been handled that way.

Now I am only too aware of the fact that a provision that limits prosecutions to private complaints could be interpreted as a reflection on the law enforcement forces. It is not the intention of our Committee at all to make any such suggestion or insinuation. We simply would like to go along with what Whitman Knapp, former Chairman of the New York City Crime Investigating Committee, did point out two years ago, with respect to all such laws - and I have here what he said - I can't find it at the moment but the gist of it was that all of these laws involving the area of sex, particularly private sexual conduct, and the Sabbath laws, which he

used as another example, are open to and unfortunately are extensively used for corruption.

Now when we are talking about the matter of blackmail, and I am talking now of private blackmail, the Commission is to be commended for removing from the Criminal Code fornication, , adultery and sodomy between private adults. And I should mention the fact, too, that our Committee, of course, is concerned in the whole area of private sexual conduct. We were to have been amicus in the case last year which went to the Supreme Court of this State challenging a fornication law of this State. You may recall that the Supreme Court avoided the Constitutional issue, although the defendant who was charged under it was acquitted - a welfare client, I think, he was from Union or Monmouth County, I'm not sure - we were to have been amicus in that case.

I would like to speak for a few moments about the matter of blackmail. By removing all of these crimes from the statute book, the Commission has put a great crimp in the activities of blackmailers because they fatten on these private sexual crimes. However, that is only half the picture. The homosexual solicitation statutes stand as one of the very important avenues of blackmail and so long as they exist they will continue to do so in view of the fact that they do not, as I've tried to emphasize, protect the class of people that they're intended to protect because there simply are not private complaints. One ought to ask the question very carefully, why do we have these statutes at all.

Nevertheless, I am not unmindful of the fact that the Committee here may decide, for reasons of its own, that some form of solicitation statute is necessary. And we are,, therefore, respectfully submitting to the Committee additions, in the form of amendments, to this proposed section 2C:34-3. If the Committee would take a look at 2C:34-3, it could easily see what we've done

because we've taken them really from the Federal Criminal Code.

We start as the proposed section says: "A person is guilty of a petty disorderly persons offense if, under circumstances in which his conduct causes offense or alarm to others, he loiters in any public place with purpose of soliciting another" and we use the words "for sexual contact" because that's the wording that the Federal Code uses and it makes sense, as you will see, "for sexual contact or offering himself for the purpose of engaging in sexual activity" and then we add, "and actually solicits such sexual contact or sexual activity."

You will notice that 2C:34-3, as it is written, proscribes loitering plus intention to solicit; it does not require an actual solicitation. This comes from the Model Penal Code 251.3, the section which I've indicated has really been repudiated by its authors. And this is what introduced the new element, namely, penalizing mere intention to solicit rather than actual solicitation. So we've required first an actual solicitation.

Then, taken from the Federal proposals, a new section (b): "Complaint by Member of the Public Required. Prosecution under this section shall be instituted only upon complaint to a law enforcement officer by someone other than a law enforcement officer who claims to have been solicited." Now we've added the words "who claims to have been solicited" for this reason: After the Federal provisions had been proposed and they had just been submitted to the Congress, we made a further examination of this very long article that I referred to you in the U.C.L.A. Law Review. It actually comes to about 200 pages. And we noticed something very peculiar there, that in the records of some of the California Police Departments - and although I'm speaking about California, I should point out that this matter of solicitation is pretty common

throughout the Country although there are some local differences -- we found that on the books of the police departments something like 80% or 90% of the arrests under these statutes were ostensibly done as a result of complaints. Well, this seemed rather startling in view of all of the other evidence to the contrary. Upon further examination, the following was discovered.

Someone might telephone the police department of "ABC" City and say, "Do you know that in such and such a bar there is homosexual solicitation going on?" and this would be done in February, and the Police would say, "Yes, we're aware of that, fine." In August the Police decided, for reasons of their own, to make an arrest at that bar, and they may have arrested 15 or 20 people for soliciting. Every one of those arrests would be on the books as the result of a complaint, the complaint having been in February.

Now, when we're talking about complaints, we're talking about complaints by people who have actually been affronted. And that is why these words were put in. And I am violating no confidence when I say that Professor Schwartz, who was head of the staff of the National Commission for Reform of Federal Criminal Laws, said that had he been aware of this at the time, they would have put this language in. In fact, the comment of the National Commission is very interesting, and this is the reason for the provision. I am quoting from the Revised Edition of this study. This is the earlier one but I have photostats of the Revised one.

"Because the conduct described may not be offensive to the person to whom it is directed and because protection of the sensibilities of a law enforcement officer are not the the purpose of the section, it is provided that a private person must initiate the complaint."

Now, finally, there is a third section, and

that is: "Punishment upon conviction under this section shall not involve imprisonment."

Now, as a petty disorderly persons offense, I think I'm right, that those found guilty under this provision could be sentenced up to 30 days, although it is true that the chances of that are not great but there is that risk. I submit to you, what therapeutic benefits would ensue from sentencing to a prison a notoriously homosexual offender for 30 days? Certainly it would appear that the example of Delaware ought to be followed.

Now the Delaware Legislature has before it at the present time a new penal code which is going to do, in the area of sodomy, just what this code is going to do, but in the case of solicitation it is going to make it only a finable offense, no matter how many times it is repeated, up to $500.

Now, we are going to submit copies of the proposed additions to this Statute. It is true that a statute like this may appear to be very small, so far as its tenor is concerned. I think we ought to realize something else. We know a great deal more, since Kinsey, about the whole ideology of homosexuality. Instead of thinking of it, as the professionals would say, a rara avis, that is, a very rare occurrence, we know that a substantial number of the population engages in homosexuality at some time and some for the entire portion of their lives.

The homosexuals of this country are, by any reasonable standards, the second largest minority in the country. The U.C.L.A. investigators pointed out that in California between 90 and 95% of all arrests of homosexuals come under the solicitation laws, that is for conduct which involves no sexual act at all but involves a conversation, solely a conversation.

We submit that it is utterly inconsistent to legalize sodomy and yet to proscribe conversations calculated to result in sodomy in private. And this raises

another issue and that is the constitutionality of these statutes.

Now, it is quite clear that it is only very recently that homosexual defendants even contemplated challenging constitutionally of such statutes because the easiest thing to do would be to plead guilty and take what, in most cases, amounted to a relatively small fine and just silently steal away. Well, this is no longer the case. I have here in my portfolio a case that was decided only two months ago in Colorado which challenged not a state statute but a municipal ordinance but which involved the very same two elements that were involved here, namely, loitering plus intention to solicit. And I think it is interesting to read what the Court did say, when it unanimously - a three-judge county court in Colorado -- as I understand, when the constitutionality, either statewise or federal, of a statute is questioned, a three-man county court, like the three-man federal court, is set up. The Court declared:

"The ordinance, upon examination, contains two elements, to wit: being in a public place and possessing a certain state of mind. No overt act is required in furtherance of the purpose for which the accused is present at such public place. Thus, the thrust of the ordinance is aimed at immoral thoughts. First Amendment rights are applied to states by the Fourteenth Amendment as shown by Winters vs. New York. In short, the ordinance in question goes even beyond the strong rights secured to the people under Freedom of Speech. We hold, therefore, that freedom of thought cannot be limited nor prohibited by law. And we find clearly, beyond all reasonable doubt, that the ordinance is unconstitutional on its face as violative of the Fourteenth Amendment."

Certainly, we are going to have to do some

serious thinking about the constitutionality of all of these solicitation statutes, particularly where - and this is the point -- while Colorado has, since this case was decided, repealed its sodomy law, so far as it is applicable to consenting adults in private, at the time this case was decided it had the traditional sodomy law that most jurisdictions had. Now, if this was unconstitutional before the repeal of the sodomy law, how much stronger is the case, in terms of state policy, where your code professes to liberalize private consensual acts in private between adults, how much stronger is the case for the law not to penalize ordinary conversations.

Now it's rather interesting, the English Act that I referred to, way back in 1898, which can be looked upon as the granddaddy of all these solicitation statutes, uses the word "persistently" - it's only one who "persistently", that is the solicitor who refuses to take no for an answer.

Should we not really be asking ourselves this: Is there a legitimate place in 20th century jurisprudence for criminal proscription of a solicitor who simply directs his question to another adult? Should we not expect any reasonable adult to be able to say no? Is this any different than any other person who is trying to market his wares - and I'm not trying to be facetious - and he does it in an offensive way? There are many things that offend us. Should we not be able to say no without the intervention of the criminal law?

However, even if we do feel - and we would suggest this only as a halfway step -- even if this Committee does feel that some kind of a solicitation statute is better than nothing - even though, as we tried to point out, they protect no one - then at least it should be surrounded with the safeguards that we have suggested.

We have underlined the additions to this proposed section that we would strongly urge the Committee

to adopt. (See p. 55 A)

ASSEMBLYMAN DICKEY: Thank you very much, Dr. Warner.

Any questions from members of the Committee?

ASSEMBLYMAN KLEIN: Dr. Warner, I must say that at least that portion of your comments which relates to an amendment that would require that there be an overt act certainly seems to me would be a very valid one. I am a little troubled, though, about some of the comments that you make. On the one hand you have suggested that solicitation is not truly a public offense and, on the other hand, you point out that, for example, in California the complaints are made by members of the public who are not victims of the solicitation. Is there not some inconsistency between those two points of view? Doesn't the California experience suggest that there are members of the public who are offended and that solicitation is indeed a public act?

DR. WARNER: No. There are two kinds of possible offenses. There is the offense that is suffered by the individual to whom the solicitation is addressed, and then there is the offense that can come vicariously from a third party who may, infrequently it's true, be privy to that solicitation by having overheard it, or perhaps just be aware by the general area in which this is going on that he assumes solicitation is going on and so he is offended.

Now, I think by definition the latter kind of offense has never been considered to be within the purview of the protection of the Criminal Law; that is, it is not intended to protect the sensibilities of people who are not themselves open to the solicitation. And this brings up a point that I neglected to mention.

Our Committee has not drafted this statute entirely isolated and without consultations with some members of the Commission that drafted this. As a result

of speaking to some members of the Commission, I think it would be only fair to say that the Commission made a mistake and was unaware, at the time, that when they used Proposed Federal Code 1853 and Model 251.3 they were using sections which have now been repudiated, and 1853 no longer exists; it's 1861.

Furthermore, I have been permitted to say, by Professor Knowlton, with whom I have discussed this on several occasions, that he was not averse to any of these proposals at all. In fact, I don't think it would be wrong to say that a few of the words in it were suggested by him rather than my own.

So that what we are asking does not go contrary to the sense of what the Commission is proposing to do; nor is it inconsistent with what is found in other places.

But, to get back to this matter of the offense, I don't know of any solicitation statute that is intended to protect the sensibilities of third parties - this is like a third party contract, so to speak, - who merely may object to the general idea that homosexuals or heterosexuals are in a place and are soliciting. I doubt very seriously whether anywhere the law has gone this far. It's intended to protect individuals who are allegedly affronted by the solicitations. Now there are some, there's no doubt about it, both heterosexual and homosexual. The question to ask is: What is the situation in a state such as Connecticut? What is the situation in a state such as Illinois? Mind you, we're not talking about solicitations for prostitution - let's make this clear; we're talking about a situation where there is no commercial element involved at all. And I don't think I did make this clear. We're talking simply of - and this is what raises the First Amendment issue - an ordinary request to perform a licit act, and the request is only addressed to another person.

ASSEMBLYMAN KLEIN: Well, I don't want to prolong the debate on that particular issue but let me

just turn to one other area of your comments.

DR. WARNER: Surely.

ASSEMBLYMAN KLEIN: And that is your suggestion that these complaints, by and large, only come from police officers --

DR. WARNER: They do.

ASSEMBLYMAN KLEIN: -- and that there should be a requirement that the person who was solicited be the complainant.

DR. WARNER: Yes.

ASSEMBLYMAN KLEIN: I'm sure you heard the previous speaker. Isn't the real reason why the victim does not make a complaint - isn't it essentially the same reason why women delay in making complaints about sexual offenses against them? In other words, the indignity of the situation is such that the person who has been offended doesn't want to talk about it, doesn't want to complain about it. And I ask you, is that not a real valid reason why these complaints are not made?

DR. WARNER: I don't think there is any doubt about what you say, that there is a certain percentage of people who are solicited that don't want to get involved in what they conceive to be a whole messy business; they simply don't want to go in and report it to the authority. There is no way of knowing how high a percentage this is but there certainly are some. But the next question we have to ask is, what does the present law do to protect those people? The law doesn't interfere at all, doesn't act as a deterrent to prevent solicitation; it doesn't at all. This doesn't answer the point that the class of people who are supposed to be protected, the very people you mention are not being protected by these laws. That point, I would think, is unassailable, unless we've missed something.

ASSEMBLYMAN KLEIN: Your suggestion is that no one is protected by these laws?

DR. WARNER: No one except the tender sensibilities of the vice squad officers whose professional duty is to daily or nightly get as many arrests as possible.

ASSEMBLYMAN KLEIN: Yes, but if a particular individual is regularly soliciting at random members of the public and he solicits 9 times and 9 members of the public who are solicited are offended but for reasons which I have just indicated don't want to make a complaint, and on the tenth occasion he solicits a vice squad officer who does make a complaint, is not the public protected?

DR. WARNER: That is true. One can always conceive of law school cases that are fine in text books but which are so divorced from reality as to make us ask should our laws be framed with respect to these extraordinary cases in mind, in terms of the social evils that these statutes produce, in terms of blackmail and corruption

Any little two-bit thug, to put it bluntly, knows that the solicitation laws are an open sesame to shaking people down. In fact, on this score we do have some evidence because a few years ago, about 3 or 4 years ago, or 6 years after the sodomy and solicitation laws had been repealed, our Committee made a study in Chicago. Now, it is well known, as I say, that any two-bit crook - if he can't think of doing anything else, can't steal a car, always knows that shaking down a queer is an easy way of getting money. Now what we did was take a sampling of people who had come out of prison. They were not in there for blackmail; they were not there for any sexual reasons or blackmail, but they were the milieu, the criminal milieu that frequently and constantly engaged in this. And what we found was this. We found basically, almost unanimously, amongst these

petty hoods, as I said, well, there's nothing we can do anymore, you can't shake them down anymore, basically there were no more pickings.

What I would submit in all respect is that in terms of the hypothetical individual that might be protected - and I say "might" because the evidence is so overwhelming in the other direction - to permit on the statute books, as Whitman Knapp pointed out, these kind of laws that do nothing but contribute to blackmail is really an outrage to human morality, if you may use the term. It's the laws here that produce the moral situations. They don't protect anyone. Oh, sure, I've heard of a case now and then. That is it.

ASSEMBLYMAN DICKEY: Mrs. Klein, have you any questions?

ASSEMBLYWOMAN KLEIN: Just one. Basically, I am very sympathetic to your position, particularly in terms of not amending these statutes but of not having them. Now, you have indicated that the statute unamended would, no doubt, in your opinion, be found to be unconstitutional.

DR. WARNER: I think in the climate of judicial opinion today in terms of Griswald, plus the extension of Griswald that came a few months ago - and you know the Brennan decision, Eisenhart vs. Beard, the birth control case in Massachusetts.

ASSEMBLYWOMAN KLEIN: Well, you did state that in your testimony. What I wanted to ask was, if you amend it, as you suggest, with the addition of these phrases, is it less likely to be unconstitutional in your opinion?

DR. WARNER: That is true. We would in a sense be legitimizing the statute. But we're honorable enough to say, we realize political imponderables being what they are, if the Committee, for reasons of its own, wanted only to give us half a loaf, all right.

ASSEMBLYWOMAN KLEIN: You would prefer that.

DR. WARNER: Yes. But in fact the ACLU, when they commissioned me to represent them, as well as my own Committee, instructed me to make quite sure that they don't want this statute at all. And I think the best proof of it is that you've got New Mexico that never had one, you've got Illinois --

ASSEMBLYWOMAN KLEIN: Dr. Warner, I just want to ask you one other question.

DR. WARNER: I'm sorry.

ASSEMBLYWOMAN KLEIN: I just feel that you gave very complete testimony and I didn't want to --

DR. WARNER: Well I tend to be verbose.

ASSEMBLYWOMAN KLEIN: Are you aware of any statutes in the ABC Laws that pertain to loitering within bars that affect the loss of a liquor license?

DR. WARNER: Yes. There was a case decided in this State, I think in 1966, known as Val's Bar decision. Basically, the administrative regulations of the ABC until that time gave cause for revocation of a liquor license to any proprietor who permitted his establishment to be a congregating place for homosexuals.

ASSEMBLYWOMAN KLEIN: Is that still on the statutes?

DR. WARNER: No. We won that in the Supreme Court of this State.

ASSEMBLYWOMAN KLEIN: Well that is no longer --

DR. WARNER: We were amicus in that case. It was pointed out that the mere presence of homosexuals was not warrant for removing a license.

ASSEMBLYWOMAN KLEIN: So that at present in New Jersey a license cannot be suspended because of that.

DR. WARNER: I would say it cannot. Right.

ASSEMBLYWOMAN KLEIN: Thank you.

ASSEMBLYMAN DICKEY: Mr. Keogh-Dwyer?

ASSEMBLYMAN KEOGH-DWYER: No questions.

ASSEMBLYMAN DICKEY: Assemblyman Wallace?

ASSEMBLYMAN WALLACE: No questions.

ASSEMBLYMAN DICKEY: Dr. Warner, you dealt with the homosexual in this matter of solicitation; I wonder if I could turn your thoughts, for a moment, to the so-called V Girls that we read about in our neighboring city of Philadelphia, and there we find solicitation by professional ladies of customers in the taverns. I don't know whether that happens in Princeton or not --

DR. WARNER: To my knowledge, it doesn't.

ASSEMBLYMAN DICKEY: With reference to your amendment then, there would be a violation because there would be an actual solicitation. Is that right?

DR. WARNER: Well, it wouldn't affect your other sections here because these would be solicitations for commercial reasons and they wouldn't come under the purview of what they are intending to amend.

ASSEMBLYMAN DICKEY: I see.

DR. WARNER: You see? We do feel that this whole matter of prostitution is something that needs a great deal of study. We discussed this, a number of members of our Committee, three years ago in a conference in Chicago with Miss Pearl Hart, and we realize we just haven't given it enough study. But the point is, when you have a commercial business, to begin with you're talking in many cases of solicitation plus, not only the commercial element but a commercial element means you've got a business, it means you've got employees, you have employers and, like all businesses, they are trying to increase their business. And this adds elements that don't exist with respect to the simple solicitations; in fact, it would be better if we had another word but we use the word "solicitation" for both, yet one is commercial and one is non-commercial.

ASSEMBLYMAN DICKEY: I see the distinction now.

DR. WARNER: I ought to tell you an example of the police corruption, the extent to which police will go, and the example is Chicago.

Illinois, as I said, has no such statute but there have been innumerable cases where there have been solicitations, a private solicitation of a vice squad man in plain clothes in Chicago and a homosexual would say, "Come to my apartment for some fun." and the vice squad man will say, "Fine." Then the vice squad man will say, "Let's stop at this cafeteria and have some coffee." So they go in and have some coffee and the homosexual will pay the 20¢ for the two cups of coffee, at which point he will be arrested, the payment for the coffee being the alleged consideration for the solicitation bringing it under the prostitution act of the state.

Now it is true that these cases are thrown out but they are thrown out only after the person has been arrested, although not booked, and his employer very often gratuitiously told that his employee has been arrested on a morals charge. It's because of the enormity of some of the transgressions on personal liberty that these statutes give rise to, although not in this jurisdiction, that the whole theory behind them is rotten.

ASSEMBLYMAN DICKEY: All right. Thank you very much.

DR. WARNER: There is one last thing. We are somewhat worried about the extent to which this Code does not fully go along with the doctrine of preemption because it is quite clear that if municipalities can by individual ordinance defeat the policy of the State if you were to modify this in the sense that we've indicated, it would defeat the whole policy, particularly since a statute like this is a typical subject for municipal regulation. Now if the present language of the preemption provision seems good but, in view of what I heard this morning, we begin to have a few doubts. So, whatever is done, we would

like to be sure that with respect to this provision certainly, whatever it ends up with, adoption of pre-emption would apply and that no local ordinances could contravene the policy laid down.

ASSEMBLYMAN DICKEY: You heard the testimony of Dr. Knowlton on that subject?

DR. WARNER: Yes, I did. I obviously assumed that what Professor Knowlton said was correct.

ASSEMBLYMAN DICKEY: Do you wish to submit some language that you think might strengthen that section on preemption?

DR. WARNER: Not at the moment, no. What I am going to leave with the Commission are copies of a memorandum that we did, which would be our second memorandum to the Commission, and if the language seems a little critical and overharsh it's because we had originally made representations to the Commission along the line of the Federal provisions and then we found that we had been completely ignored by their using these repudiated provisions. So if the tenor of this memo-randum is a little on the complaining side, I think all of us, including the members of the Commission - some of which have already seen it - are not going to be surprised. I would like to leave these copies with your Committee, together with our proposed new language.

Now, Dr. Valente who is, I believe, the next gentleman on your list to speak, is on our Board of Advisors, the Board of Advisors of our Committee, and the former Chairman of the Department of Religion at Seton Hall.

ASSEMBLYMAN DICKEY: All right. We will call Dr. Michael F. Valente, Seton Hall University, representing the National Committee for Sexual Civil Liberties.

M I C H A E L F. V A L E N T E: I am Michael F. Valente and I reside at 232 Sanford Avenue in Newark. I am President of the Institute for the Study of Ethical

Issues in New York City, former Chairman and presently Associate Professor in the Department of Religious Studies at Seton Hall University. And I am a member of the Advisory Board to the Committee of which Dr. Warner is the Chairman.

I would like to speak very briefly in favor of the excellent work on the proposed Code in removing certain statutes that had attempted to regulate private sexual acts. I see the new Code as offering New Jersey the opportunity to move forward, legislatively, and in some areas take the lead in bringing the Criminal Law to the genuine service of protecting the common good without pandering to the private moral convictions of any individual or group.

I would like to stress that religious groups no longer take the absolutist, monolithic view of sexual morality that they did take in the past. There has been considerable reinterpretation of past thinking along these lines and I think that one finds today considerable conviction all across the board that matters of sexuality surely ought not to be the concern of the Criminal Code even though for some individuals or indeed for some religious groups some of these matters are conceived of as sinful or matters of conscience. I have in mind, for example, contraception. There are certain individuals who, as a matter of conscience, feel that engaging in an act of contraceptive coitus would, if unrepented, condemn them for all eternity to hell. And this is a legitimate religious viewpoint, I think, for the persons who hold it, but I believe that we have turned away, in this country, at least as of a couple of years ago, in all of the states now, from laws that would prohibit contraceptive coitus.

I would like to mention further that - to bring us up to date rather quickly - there are certain ministers who today are even advising and counselling

individuals to engage in acts that have been proscribed in the past, such as fornication, premarital sex, even adultery.

I think what I am trying to get at is, if the law is based upon religious conviction, these religious convictions seem to have been based upon a concept of natural law. The natural law doctrine to which I refer is a doctrine of human sexuality that requires that every sexual act be open to procreation. And, consequently, things like contraception in any form, homosexual acts, would be proscribed by certain religious viewpoints but current natural law theory tends to repudiate the idea that anything is unnatural to man if it is a product of his ingenuity and inventiveness. There are those who would make the following kinds of religious statement: "I refuse to fly in an airplane because if God had intended me to fly he would have given me wings." "I will not allow my underaged child to have his appendix removed because it is against my religious viewpoint, it violates the natural law."

As far as New Testament scripture is concerned, I find nowhere in the New Testament an in-depth discussion of either sexuality or sexual morality. I feel that the prohibitions that we sometimes find are attempts to convey a religious message, specifically a message of concern for one's fellow man, and that they naturally use examples of ordinary or accepted or customary behavior from their own times, from their own years, from their own circumstances, and I think these are used as illustrations only and ought not be confused with the sacred message itself.

Furthermore, while we have seen situations in the past in which the Criminal Code proscribes certain actions based upon religious morality, I think it is wide religious conviction today that it would be immoral, even religiously speaking, to retain on the statute books laws that are essentially unenforceable, laws that might

invite corruption, blackmail or extortion, and laws that might foster disrespect for the law.

It is dangerous to the respect for law, which we need so desperately today, to allow any private interest lobbies to derail the attempts of the Commission's proposed Code to bring the law into harmony with the widespread convictions of most ordinary persons.

And if I may speak as an ordinary person, I certainly wouldn't want any of my tax monies devoted to the various kinds of law enforcement, whether this be the salaries of the policemen or the judge or prison officials, or whatever, in cases involving private sexual activities. I think that's a waste of my hard-earned money.

Finally, I would like to make, if I may, one comment on imprisonment. I think that imprisonment must be used very sparingly as it is so dehumanizing, that from my own viewpoint, insofar as I have been able to reflect upon what I see around me, imprisonment creates within a person very often the desire to function antisocially for the remainder of his life in a kind of attempt to balance out or redress the terrifying dehumanization that any loss of freedom, such as imprisonment, implies. Because it's the very essence of man's nature, as man, that unlike the lower animals he possesses a rational mind and it is not by sheer instinct but by his irreplaceable freedom to choose to act.

Thank you.

ASSEMBLYMAN DICKEY: Thank you very much, Dr. Valente.

Any questions from members of the Committee?

(No questions)

Thank you very much.

Does anyone else wish to testify before the Committee? Would you step forward, sir. May we have your name, please?

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